

Support Center Elizabeth City's Guide for Executive Order 13101

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OVERVIEW – SUPPLY CENTER, ELIZABETH CITY’S GUIDE FOR EO 13101

This EO 13101 Guide provides an overview of environmental issues confronting the Support Center, Elizabeth City, including contracting offices. This guide is not an administrative, technical, or regulatory directive. It will not make you an environmental contracting expert; you do not need to be. There are many technical experts within the Coast Guard, DOT, and the Federal Government that can assist you when addressing environmental issues. It will provide you with information useful in understanding the Support Center’s environmental program. It will summarize key issues, terms, and regulations. **This guide will help you ask additional questions that may reduce potential contracting problems in the future.**

Environmental consideration must be given to everything that Contracting does. This includes the way we review specifications, administer contracts, purchase products, and ensure our contractors meet environmental requirements. In many ways environmental contracting is not any different, than say, buying construction, services, or commodities. Like contracting, environmental issues are driven by a wide variety of laws and regulations that impact every project and decision our customers make. How can you comply with these laws if you do not know what they are and what we are liable for under each? In addition, many actions taken by the facility are beyond the ECD’s control. This results in a degree of complexity that is difficult to incorporate contractually. **If there is an environmental issue in any of your contracts, contact the Support Center Environmental Compliance Division.** The ECD is here to help you comply with the maze of environmental laws. Environmental issues require a general understanding by the contracting community if we are to provide efficient and timely contracting support.

The Support Center’s goal is to comply with all federal and state laws, executive orders, DOT regulations and guidelines, and Coast Guard policy. Compliance applies to our operation and mission requirements, how we do things, and the restoration of sites contaminated by previous operations. Compliance is one of the major challenges facing the Support Center. Congress, the Environmental Protection Agency, states, and political and environmental groups will continually expand the portfolio of environmental laws to meet the challenges of a clean and healthy environment.

The compliance challenge facing the Support Center is easily illustrated by the amount of and extended time line of federal environmental legislation. Since the 1970’s over 50 environmental laws have been enacted. Throw in the other statutes, and executive orders and this creates a compliance challenge.

We must incorporate environmental planning into all phases of the acquisition process, even if it is not a specific environmental purchase. **The result will not only help the base but also the environment. "THINK GREEN!"**

Important Terms

Affirmative Procurement Program - a program established by federal agencies, as required under EO 13101, assuring materials composed of recovered materials (Guideline Items) will be purchased to the maximum extent practicable, consistent with federal law and procurement regulations.

Biobased product - a commercial or industrial product (other than food or feed) that utilizes biological products or renewable domestic agricultural (plant, animal, and marine) or forestry materials.

Certification - written documentation provided by offerors/bidders/vendors certifying the percentage of recovered materials contained in products.

Environmentally preferable - a broad term for products or services having a lesser or reduced effect on human health and the environment when used, maintained, and disposed of in comparison to a competing product or service. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, and disposal of the product or service. Generally, environmentally preferable products are those manufactured from recycled and reclaimed materials.

Guideline Items - items designated in Environmental Protection Agency's (EPA's) Comprehensive Procurement Guideline that are, or can be, made with recovered materials.

Life cycle cost - the amortized annual cost of a product, including capital costs, installation costs, operating costs, maintenance costs, and disposal costs discounted over the lifetime of the product.

Minimum content standard - the minimum recovered material content specifications set to assure the recovered material content required is the maximum available without jeopardizing the intended item end use, or violating the limitations of the minimum content standards set forth by EPA guidelines.

Postconsumer material - a material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item. "Post-consumer material" is a part of the broader category of "recovered material" (see below). Examples of post-consumer material include paper, paper-board, and fibrous wastes from retail stores, office buildings, and homes

Postconsumer waste - a material or product, discarded for disposal after passing through the hands of a final user, having served its intended purpose.

Recovered material - waste materials and by-products recovered or diverted from solid waste, excluding those materials and by-products generated from, and commonly reused within, an original manufacturing process. Recovered material is a broad term that covers both pre- and post-consumer materials. Examples of recovered materials include manufacturing and forest residues; obsolete finished paper inventories and fibrous by-products of harvesting and woodcutting processes.

Recyclability - degree to which a product or material may be recovered or otherwise diverted from the solid waste stream for the purpose of recycling.

Recycled material - a material utilized in place of raw or virgin material in product manufacturing consisting of materials derived from post-consumer waste, industrial scrap, material derived from agricultural wastes, and other items, all of which can be used in new product manufacture.

Recycling - a series of activities, including collection, separation, and processing, by which products or other materials are recovered from the solid waste stream for use as raw materials in the manufacture of new products.

Introduction

The federal government, America's largest consumer, was directed by the President in Executive Order (EO) 12873, *Federal Acquisition, Recycling, and Waste Prevention*, October 1993, to work at increasing and expanding markets for recovered materials through greater federal government preference and demand for such products. In addition, EO 12873 directed federal agencies (including the Department of Transportation) to implement cost-effective procurement preference programs (Affirmative Procurement Programs) favoring the purchase of "environmentally preferable" products and services. This federal pollution prevention effort is designed to stimulate consumer awareness of environmentally preferable products, increase market availability, and set a pollution prevention example for the public. EO 12873 has since been superseded by EO 13101, which reiterates and expands upon the original requirements of EO 12873 and, among other things, creates a parallel program for purchasing "biobased products".

Regulatory Framework

Affirmative Procurement Programs for federal agencies are established and governed by portions of the Resource Conservation and Recovery Act (RCRA), various Executive Orders, including EO 13101, and a host of guidance documents published by the EPA.

RCRA

Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. . 6901, et seq., Section 6002, "Federal Procurement." This Section, the rules for which are codified in Title 40 Code of Federal Regulations (CFR) 247.6, *Affirmative Procurement Programs*, requires federal agencies to procure designated Guideline Items composed of the highest practicable percentage of recovered materials. In addition, it establishes several objectives for protecting human health and the environment, and for conserving valuable resources through improved solid waste management and resource recovery practices. To that end, this law requires federal agencies to give preference in their purchasing programs to products and practices that are "environmentally preferable." RCRA requires Affirmative Procurement Programs to contain four elements:

- A demonstrated preference for procuring recycled products that meet recycled content standards;
- An affirmative procurement promotion and education program for employees and contractors;
- Procedures for vendor certification verifying recycled/recovered material content; and
- Procedures for monitoring the effectiveness of the Affirmative Procurement Program.

EO 13101

Executive Order (EO) 13101, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, 14 September 1998 (63 FR 49643) revoked and superseded EO 12873, *Federal Acquisition, Recycling, and Waste Prevention*, October 1993.

EO 13101 reiterates, supports, and expands upon the original requirements of EO 12873. EO 13101 strengthens federal efforts to protect the environment and promote economic growth through the purchase of recycled and other environmentally preferable products. It directs agencies to establish recycling targets, encourages them to purchase bio-based and other "green" products, and creates a White House task force to oversee federal recycling efforts. The EO recognizes that the U.S. government is the single largest consumer of goods and services in the world - spending more than \$200 billion annually. This means the U.S. government has tremendous purchasing power, which must be leveraged to acquire products and services leading to the minimization of raw material consumption, waste generation, and ultimately to the betterment of the nation's environmental quality.

Comprehensive Procurement Guidelines

EO 13101 directs the EPA to establish **Comprehensive Procurement Guidelines (CPG)**, which designate EPA Guideline Items. It also requires the mandatory procurement of Guideline Items by federal agencies. Federal agencies were initially required to procure five Guideline Items. EPA then designated nineteen additional Guideline Items in the CPG published 1 May 1995. The latest amendment to the CPG added 12 additional Guideline Items in November 1997 and again in January 2000. The current CPG is codified in Title 40 CFR Part 247, *Comprehensive Procurement Guideline for Products Containing Recovered Materials*, and contains detailed descriptions of the 55 currently designated Guideline Items and recommended procedures to comply with affirmative procurement objectives.

Applicability

Once a guideline item is designated by EPA, procuring agencies are required by RCRA and 40 CFR 247 to purchase a product composed of the highest percentage of recovered materials practicable, taking into consideration competition, price, availability, and performance. RCRA defines "procuring agencies" as federal, state, and local agencies, and their contractors, that use appropriated federal funds. According to CPG I, the requirement applies when the purchase price of the item exceeds \$10,000 or when the total cost of such items, or of functionally equivalent items, purchased by the **agency** during the preceding fiscal year was \$10,000 or more.

In applying the \$10,000 annual threshold, Section 202 of EO 13101 defines the term "agency" to be the Department of Transportation, not an individual department. Therefore, because DOT spends more than \$10,000 annually on each of the guideline items: 40 CFR 247 also points out that RCRA AP requirements apply to federal agencies whether or not they are using appropriated funds for procurement of designated items. Therefore:

Non-appropriated fund activities must participate in the installation APP to ensure that when they purchase guideline items for their own use, their purchases meet EPA recycled-content requirements.

Section 701 of EO 13101 directs agencies to include AP requirements in all contracts for operation of Government-owned or leased facilities, and also in contracts that provide for support services at Government-owned or operated facilities. This is clearly stated in the EO:

Contracts awarded by executive agencies after 14 Sept 98 shall include provisions that obligate the contractor to comply with EO 13101 within the scope of their operations.

Requirements for Purchasers of Guideline Items

Exemptions and Written Determinations

The APP is intended to promote cost-effective environmentally preferable purchasing. The authors of RCRA recognized that there would be occasions when the use of a recycled-content product would not meet operational needs, and they provided exemptions to cover these situations. These exemptions are reflected in EO 13101, 40 CFR 247 Recycled-content products meeting EPA guidelines will always be purchased unless they:

- Are not available within a reasonable period of time; or
- Fail to meet the performance standards set forth in applicable specifications or fail to meet reasonable performance standards of the procuring agency; or
- Are not available from a sufficient number of sources to maintain a satisfactory level of competition (i.e., available from two or more sources); or
- Are only available at an unreasonable price. If the cost of the recycled-content product exceeds comparable product costs, the cost is considered unreasonable.

Exemption:

An exemption may be claimed if one or more of these criteria are met. **To invoke the exemption, a written determination is required.** FAR 23.404(b)(3) places the responsibility to prepare this determination on "technical or requirements personnel" and states it must be signed "by an official designated by the agency head EO 13101.

Section 402(c) eases these paperwork requirements by stating that **written determinations need not be provided for micropurchases (less than \$2,500)**. Micropurchases are typically made by credit card. However, **it is the size of the purchase, and not the purchase mechanism, that dictates when the written determination must be prepared**. The requirement for written documentation applies to all guideline item purchases over \$2,500 - even if the purchase is made by credit card.

Written determinations need to be kept in procurement files to document the decision to make a non-compliant purchase. This information will be important in case the installation receives an EPA or state audit of affirmative procurement compliance. Written determinations also document the decisions made by construction project managers, and are essential documents in case the designer's selection of materials is challenged by a bid protest.

- For each **contract** that includes guideline items and claims an exemption, a copy of the written determination must be provided to the contracting officer. DFARS 23.404(b)(3) states: "A contract for an EPA designated item that does not meet the EPA minimum recovered material standards shall not be awarded before approval of the written determination required by FAR 23.404(b)(3)."
- If a guideline item purchase over \$2,500 is made on a **credit card**, the written determination should be filed with the credit card holder's purchase records.

There is no legal requirement to prepare a determination form for purchases over \$2,500 that **meet EPA requirements**.

Summary of Requirements for Purchasers

The requirements for purchasers of guideline items can be summarized as follows:

Each CONUS installation must have an AP program, and all purchases of guideline items must comply with EPA recycled-content requirements unless an exemption applies. Purchases made in the United States for shipment overseas also must comply with EPA requirements.

Overseas purchasers are encouraged (but not required) to buy recycled-content products locally whenever these products meet technical needs, are readily available, and cost effective. The following requirements apply to CONUS installations only:

If a contract includes the purchase of guideline items, the contract specifications must require the product to meet the EPA recovered material content requirements, unless written determination is provided for the contract file before the contract is awarded.

When making a credit card purchase of guideline items exceeding \$2,500, the purchaser must select products meeting EPA recovered material content requirements unless an exemption applies. If the requirements were not met, a written determination must be placed in the purchase files. When making a credit card purchase of guideline items less than \$2,500, the purchaser must select products meeting EPA recovered material content requirements unless an exemption applies. The written determination is not required if an exemption is invoked for micro-purchases.

Certain details of the APP requirements vary with the dollar value of the purchase. The requirement for written determinations is one such instance. The other is the requirement to insert contract clauses. **It is important to understand that these are unique circumstances for individual purchases. They do not provide an excuse for avoiding APP requirements in general.** Section 402(c) of EO 13101 states: "For the EPA designated guideline items . . . agencies shall ensure that their affirmative procurement programs require 100 percent of their purchases of products to meet or exceed the EPA guideline".

Programmatic Requirements for Affirmative Procurement

EO 13101, Section 402 describes the overall scope of the APP as follows:

- Agencies shall consider pollution prevention in acquisition planning for all procurement and in the evaluation and award of contracts;
- Agencies shall establish AP programs meeting RCRA requirements for all EPA-designated guideline items purchased by their agency;
- Agencies shall ensure that responsibilities are shared between program personnel and acquisition and procurement personnel;
- For the EPA-designated guideline items, agencies shall ensure their AP programs require 100% of their purchases of products to meet or exceed the EPA guideline unless an exemption is justified in writing;
- For newly designated items, agencies have one year from the date of EPA's final rulemaking to revise their internal AP programs.

Getting What You Want: Specifications and Work Statements

Under RCRA, specifications for guideline items must require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of those items. This applies whether the contract language is written in-house, or is prepared by others such as architectural-engineer (A-E) design firms. The FAR 23.704 requirement is to obtain products and services considered to be environmentally preferable (based on EPA-issued guidance), and to promote cost-effective waste reduction when creating plans, drawings, specifications, standards, and other product descriptions.

Many service contracts include a requirement to provide guideline items. If the contractor is to be held responsible for complying with EPA recycled-content requirements, the contract must contain language specifying these requirements. Pay special attention to **contracted supply operations** such as Contractor Operated Civil Engineer Support Services (COCESS) and office supply stores operated by contractors, and to service contracts for **grounds maintenance, janitorial and reproduction services**. These are usually multi-year contracts. The contracts must be written to ensure they stay current with EPA's changes to the CPG and continue to provide the installation with products meeting EPA recycled-content requirements.

Another major procurement avenue for guideline item purchases is through **construction contracts**. CPG requirements must be met, unless an exemption applies, whether the project specifications are written in-house or by contract. FAR Part 36 covers construction and A-E contracts. It provides selection criteria to use when selecting A-E firms, and also includes required actions for government project managers and A-E firms.

FAR 36.602-1 lists selection criteria for A-E firms. The Government shall select A-E firms based on several factors, including specialized experience and technical competence in energy conservation, pollution prevention, waste reduction, and the use of recovered materials as appropriate.

FAR 36.601-3 says that Statements of Work for A-E services shall require the A-E to specify the maximum practicable amount of recovered materials, consistent with performance requirements, availability, price reasonableness, and cost effectiveness.

FAR 36.601-3 also requires the A-E to consider energy conservation, pollution prevention, and waste reduction to the maximum extent practicable in the specifications.

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For all types of contract actions, the first step is to write the Statement of Work (SOW) or Performance Work Statement (PWS) correctly. It must be clear to all potential vendors that they are required to meet EPA requirements whenever they provide a guideline item to the Government as part of their contract. Here is one example of "boilerplate" contract language:

In an effort to comply with the affirmative procurement requirements of Section 6002 of RCRA and Executive Order 13101, the Government strongly promotes the use of the recycled and recovered materials and products identified in the Environmental Protection Agency's Comprehensive Procurement Guidelines. These materials and products must meet the requirements of the Specifications, must not delay the progress of the work, and must not be cost prohibitive. EPA guideline items are seen as the minimum that should be considered when evaluating recycled/reuse materials. Other materials and products not listed, but commonly used in industry outside of the government, should also be considered. Material and product submittals for all recycled-content items should list the recycled and recovered materials used and the percentage content.

To meet Executive Order requirements, engineering project managers need to review and revise all service contracts and construction specifications to include recycled-content materials and other environmentally preferable products and practices. Boilerplate language at the beginning of the contract is the minimum that is required. Success at meeting APP requirements is much more likely if a little more effort is made. Review the service contract or project design in detail, identify all of the guideline items to be used, and write specific recycled-content requirements into all applicable sections of the service contract PWS or the construction specifications. For example, if the project requires concrete, insulation, and latex paint, be sure that each of these sections describes the recycled-content requirements. Here is an example of language that might appear in the specification section for building insulation:

Provide fiberglass insulation with recovered material content, minimum 20 to 25% percent by weight, of glass cullet. Provide foam sealant with recovered material content, minimum 5% by weight.

Understanding Specific Product Requirements

Recycled-content guideline items and biobased products are all part of the APP, but they are found on different lists prepared by different agencies, and so the requirements differ. The following sections will discuss these requirements in detail.

Recycled-Content Guideline Items

The EPA specifies the types of products to be included in the APP by listing them in the CPG. The guideline item list is divided into eight categories:

Construction Products
Non-Paper Office Products
Landscaping Products
Transportation Products
Park and Recreation Products
Vehicular Products
Paper and Paper Products
Miscellaneous Products

EPA's Web site (www.epa.gov/cpg) is the best source for the latest CPG product list and the specific recycled content requirements for each product. The web site also offers technical support information including product fact sheets, recommendations on how to specify compliant products, and lists of manufacturers and suppliers of guideline AP items. Along with the CPG, EPA issues guidance on buying recycled-content products in documents called Recovered Material Advisory Notices (RMANs). The RMANs determine appropriate recycled-content ranges for CPG products based on current information about commercially available recycled-content products. These ranges are updated as market conditions change.

Unique Requirements for Certain Guideline Items

Paper. Section 505 of EO 13101 places specific requirements on federal agency purchases of high speed copier paper, offset paper, forms bond, computer printout paper, carbonless paper, file folders, white wove envelopes, writing and office paper, book paper, cotton fiber paper, and cover stock. For each of these items, the minimum content standard was raised to 30 percent post-consumer materials effective 31 December 1998. If products with 30 percent post-consumer content are not available, do not meet performance requirements or are unreasonably priced, federal purchasers must buy products containing no less than 20 percent post-consumer material. No exemptions to the 20 percent minimum are authorized. As an alternative to these requirements, paper products having 50 percent recovered materials may be used.

Re-refined Lubricating Oil. Section 507 of EO 13101 calls on fleet and commodity managers to take immediate steps to procure re-refined oil. It also states this requirement does not preclude the acquisition of bio-based (vegetable) oils.

Retread Tires. Section 507 of EO 13101 names the DoD Cooperative Tire Qualification Program as a focal point for retread tire purchases. This program is administered by the Army Tank-automotive and Armaments Command (TACOM). Their program information is found on the "Team Tire" website

Bio-based Products

Bio-based products will become part of the APP when USDA creates the first bio-based product list. Agencies are "encouraged" by Section 504 (b) of EO 13101 to "modify their AP program to give consideration to those products. However, not all APP requirements will apply to bio-based product purchases. For example:

- EO 13101 does not require agencies to set a goal for a specific percentage of their purchases to be bio-based products; and
- EO 13101 does not require agencies to prepare written determinations if they decide not to purchase biobased products.

According to USDA's 13 Aug 99 Federal Register notice, "Biobased products submission for listing by USDA; procedures": "The Biobased Product List (BPL) does not qualify as a rulemaking under the Administrative Procedure Act.... The listing is without a binding effect. Agencies are not required to purchase bio-based products, and listing does not guarantee any sales of such products."

Unfortunately, a reporting requirement exists. One year after USDA places a product on the BPL, Section 302(b) (6) of EO 13101 requires agencies to estimate their purchases of that product and report the estimate to the Secretary of Agriculture. The procedures for estimating biobased product purchase data have not yet been developed.

Compliance Assurance

Section 403 of EO 13101 states that EPA inspections of federal facilities "will include, where appropriate, evaluation of facility compliance with section 6002 of RCRA and any implementing guidance." The EO also calls on the EPA Administrator to encourage authorized states to evaluate AP compliance as part of their RCRA inspections.

Applicability to the Support Center

The AP requirements of RCRA 6002 are outside the scope of the waiver of sovereign immunity set forth in RCRA 6001, as that waiver extends only to the "control and abatement of solid waste or hazardous waste disposal and management." Only Congress can broaden a waiver of sovereign immunity. Thus, direction in EO 13101 that regulators review compliance with RCRA 6002 during RCRA inspections does not make bases subject to enforcement actions for alleged violations of that section. The bottom line is that while bases should comply with the EO, personnel should also understand that any enforcement of RCRA 6002 AP requirements by regulators is beyond the scope of their authority. An NOV may be issued for affirmative procurement violations, but inclusion of RCRA section 6002 requirements in a subsequent Administrative Order would be an overreach of the regulator's enforcement authority. In other words, EPA/State can issue an APP NOV but can not take enforcement action based on APP violations. .

Vendor Estimates, Certification and Verification

The third RCRA program element is **for vendor estimates, certifications and verification**. It requires vendors to certify that the products they are providing to the installation do indeed meet EPA requirements, and provides data on recycled-content material use. This is accomplished through contract clauses as required by the FAR.

FAR 52.223-4 Recovered Materials Certification. Insert in all solicitations that are for, or specify the use of, recovered materials. It states that the contractor certifies, by signing the bid documents, that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by the applicable contract specifications.

FAR 52.223-9 Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items. When this clause is used, the contractor is required to certify that recycled-content materials were provided as called for in the specifications. The contractor is also required to estimate the percentage of recovered materials actually used in the performance of the contract. Use FAR 52.223-9 only when the total contract value (not the value of the guideline items purchased) exceeds the simplified acquisition threshold, or \$100,000. (However -as stated earlier, the size of the contract is not a license to ignore all other APP requirements besides contractor certification.)

FAR 52.223-10 Waste Reduction Program. Insert this clause to promote cost-effective waste reduction in contracted operations. It isn't directly related to AP, but supports the larger EO 13101 goals of recycling and waste reduction

How Do I Find Products Conforming to EPA Recovered Material Content Standards?

Listed below are a few of the better **sources for information** about recycled content products and Guideline Items:

- The **Environmental Protection Agency (EPA)** has published a series of fact sheets summarizing information on the CPG program, EPA's recovered materials content recommendations, case studies, and other key resources. These documents are available for downloading at <http://www.epa.gov/cpg/factshts.htm>.
- The **General Services Administration (GSA)** publishes several environmental catalogs and guides offering stock-listed products containing recovered materials, and other environmentally preferable products and services available through the Federal Supply Service (FSS). Recovered material and post-consumer material content specifications for each product are included, allowing quick reference to items available through GSA. The catalogs, as well as other related information, can be accessed from GSA's "Think Green" WWW site at <http://pub.fss.gsa.gov/enviro/index.html>. The GSA, in consultation with the Office of the Federal Environmental Executive (OFEE), has made the decision to purchase and only sell 30 percent post-consumer recycled-content copier paper to federal agencies.
- The **Defense Logistics Agency (DLA)**, through the Defense Supply Center Richmond (DSCR), provides supplies and services to America's military forces worldwide and manages over four million consumable items. The DLA *Environmental Products* catalog is divided into broad product headings that allow easy selection of possible alternatives to hazardous chemicals or processes currently in use. The catalog can be accessed, and orders can be placed, from DLA's Environmental Products WWW site at <http://www.dscr.dla.mil/products/epa/eppcat.htm>. DSCR also offers the "Closed-Loop" program for re-refined oil, which eliminates the necessity to dispose of used oil.